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SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1006

JOE LEWIS and
TOMMY ALLEN COMBS ..... PETITIONERS

v.

UNITED STATES
OF AMERICA ..... RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAN JACK COMBS
207 Caroline Avenue
Pikeville, Kentucky 41501

Counsel for Petitioners

PRINT MASTER INC., 845 LANE ALLEN RD., SUITE 23, LEXINGTON, KY. 40504, PH. 277-5134

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SUPREME COURT
OF THE UNITED STATES

October Term, 1974

No._____

JOE LEWIS and
TOMMY ALLEN COMBS ..... PETITIONERS

v.

UNITED STATES
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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered therein on the 8th day of October, 1974.

Petition for Rehearing was denied on the 15th day of January, 1975.

OPINION BELOW

The Opinion of the Court of Appeals for the Sixth Circuit is reported in 504 F.2d (No. 2) 92, 104 and appears in the appendix hereto. This opinion affirmed a judgment of conviction of petitioners for possession of stolen explosives in violation of 18 U.S.C. §842(h).

Petitioners were tried by jury in the Pikeville Division of the United States District Court for the Eastern District of Kentucky, and given four-year sentences.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 8, 1974. Petition for Rehearing was denied on January 15, 1975.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. **Was the initial search and seizure purely a state matter under the requirements of the Tenth Amendment to the United States Constitution and Rule 19 (1) (b) of this Court, therefore requiring the Court's adherence to the decision of the Court of Appeals of Kentucky in the case of Combs and Lewis v. Commonwealth of Kentucky, Ky. 516 S.W.2d 105?**

II. Were petitioners' Sixth Amendment rights violated in not trying their case at the Jackson Division of the Court?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Four: United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Amendment Six: United States Constitution

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Amendment Ten: United States Constitution

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

Section 10: Constitution of Commonwealth of Kentucky

> Search warrants; seizure of person; provisions concerning — The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

STATUTES AND RULES INVOLVED

28 USC, §97(a):

> "The Eastern District comprises the counties of Anderson, Bath, Bell, Boone, Bourbon, Boyd, Boyle, Bracken, Breathitt, Campbell, Carroll, Carter, Clark, Clay, Elliott, Estill, Fayette, Fleming, Floyd, Franklin, Gallatin, Garrard, Grant, Greenup, Harlan, Harrison, Henry, Jackson, Jessamine, Johnson, Kenton, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, McCreary, Madison, Magoffin, Martin, Mason, Menifee, Mercer, Montgomery, Morgan, Nicholas, Owen, Owsley, Pendleton, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Scott, Shelby, Trimble, Wayne, Whitley, Wolfe, and Woodford.
>
> Court for the Eastern District shall be held at Catlettsburg, Covington, Frankfort, Jackson, Lexington, London, Pikeville, and Richmond."

28 USC, §1861:

> "It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes . . .".

18 USC, §3240:

> "Whenever any new district or division is established, or any county or territory is transferred from one district or division to another district or division, prosecutions for offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been transferred, unless the court, upon the application of the defendant, shall order the case to be removed to the new district or division for trial."

FRCP, Rule 18:

> "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

STATEMENT OF THE CASE

Near midnight, on September 3, 1972, Kentucky State Policemen Leroy Thompson and Alexander Collins, were responding to a drunk complaint in the Busy area of Perry County, Kentucky. During their stay in this area a red '61 Chevrolet pickup truck equipped with a camper top drove past their cruiser. According to the officers, they observed that it had defective tail lights and a loud muffler. Their blue rotating beacon was turned on and the truck stopped immediately. Petitioner, Joe Lewis, was driving the truck. At the request of the officers, Joe Lewis displayed his drivers license.

One of the officers testified at a preliminary hearing in Perry County that as they approached the rear of the truck they observed through the rear window of the camper boxes with the words "Danger — Electrical Blasting Caps" printed thereon. Printed on the rear of the bed of the truck were the words "General Construction Company". Apparently based upon this observation, and the hour of the night the officers ordered both petitioners out of the truck, patted them down and placed them in their cruiser. One of the officers requested petitioner, Lewis, to open the rear doors of the camper. He refused and informed them that if they wanted it open to open it themselves. Trooper Collins remained in the cruiser with the arrestees while Trooper Thompson forced open the rear of the camper and examined the

contents of the boxes. He found electrical blasting caps. He then searched the cab of the truck and removed two 22-caliber rifles, a tire tool and a pair of bolt cutters.

After daylight other officers commenced a search of the area to determine whether or not there had been a burglary of a powder magazine. Within a few hours they discovered that the R. C. Durr magazine near Dry Hill in Leslie County, Kentucky, had been burglarized and that several hundred dollars worth of electrical blasting caps had been removed therefrom. The caps removed from the truck in which petitioners were riding were identified as having been removed from the R. C. Durr magazine.

These facts gave rise to three separate criminal proceedings being instituted against petitioners. The first was in the Perry Circuit Court wherein they were indicted for "possession of burglary tools" (i.e., the bolt cutters and tire tool). The second in the Leslie Circuit Court for "breaking and entering the R. C. Durr Construction Company powder magazine" by the use of the tire tool and bolt cutters; and the third for violation of 18 USC 842(h). Denying the existence of probable cause at the time of the arrest, search and seizure, motions to suppress were filed in each of the three courts, all of which were summarily overruled.

The petitioners were found not guilty for possession of burglary tools by a jury of the Perry

Circuit Court. During the trial the Commonwealth attempted to prove by Agent Hatton, State policemen Jarvis and Thompson, that the tire tool and bolt cutters had been used by petitioners to burglarize the warehouse. Notwithstanding the outcome of this case and notwithstanding petitioner Joe Lewis' motion for the return of the tools, they were released to ATF Agent Hatton.

Their next trial was in the Leslie Circuit Court. At that trial, and over petitioners' objections, the Commonwealth attempted to prove that the tire tool and bolt cutters had been used to burglarize the R. C. Durr magazine. Petitioners were convicted of this offense and sentenced to one year in the state penitentiary. They appealed this conviction to the Court of Appeals of Kentucky and obtained a reversal on September 27, 1974. (See Appendix, p. 27a-28a)

On December 15, 1972, an order was entered by the three Judges of the United States District Court for the Eastern District of Kentucky reassigning counties to the Catlettsburg, Lexington and Pikeville jury divisions, because ". . . the disposition of the business of the Court may be more expeditious and for other reasons deemed practical. on and after January 2, 1973 . . .". (See Appendix, p. 29a-30a)

Thereafter an order was entered transferring this cause from the Pikeville Division to the Lexington Division for trial. Petitioners objected to this transfer

and sought to stay all proceedings except their trial in the Jackson Division. (See Appendix, p. 31a-33a)

This motion was summarily overruled and trial conducted at Lexington which resulted in a hung jury. The case was then reassigned to Pikeville for a second trial, resulting in their conviction. At each of these trials the Government, over petitioners' objections, sought to prove through the same witnesses they had used in the Perry and Leslie Court cases that the tire tool and bolt cutters had been used by petitioners in burglarizing the R. C. Durr powder magazine.

ARGUMENT

I. THE WRIT SHOULD ISSUE BECAUSE THE INITIAL SEARCH AND SEIZURE BEING A PURELY STATE MATTER THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND RULE 19(1)(b) OF THIS COURT REQUIRES THIS COURT'S ADHERENCE TO THE DECISION OF THE COURT OF APPEALS OF KENTUCKY IN THE CASE OF COMBS AND LEWIS V. COMMONWEALTH OF KENTUCKY, KY. 516 S.W.2d 105.

On September 27, 1974, the Court of Appeals of Kentucky in the case of *Combs, et al* v. *Commonwealth of Kentucky,* Ky. 516 S.W.2d 105, reversed the conviction of the Leslie Circuit Court. In that proceeding, as in this, the Court had permitted the introduction into evidence of the tire tool, bolt cutters and electrical blasting caps seized from the camper. Their conviction was reversed because that Court felt

that large boxes in the camper labeled "danger — electrical blasting caps" did not constitute probable cause. As required by the Fourth Amendment of the Constitution of the United States of America and Section 10 of the Constitution for the Commonwealth of Kentucky.

Eleven days later the United States Court of Appeals for the Sixth Circuit arrived at an entirely different result. We submit that this holding is erroneous for these reasons:

(1) Though the large marked boxes were in plain view and had the words "electrical blasting caps" printed thereon there was no evidence that the boxes actually contained stolen electrical blasting caps. The fact that they contained caps was not discovered until they had forced open the camper. The fact that the caps were stolen was not discussed until the next morning. We therefore submit that the most the officers had at the time of the opening of the camper was mere suspicion. As said by this Court in the case of *Brinegar* v. *United States,* 338 U.S. 160, 175, "Probable cause means 'more than bare suspicion.' * * * * It means 'a reasonable ground for belief of guilt'." In discussing probable cause this Court held in the case of *Carroll* v. *United States,* 267 U.S. at 162 "Probable cause exists where 'the facts and circumstances within their (the Officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves

to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."

(2) The Sixth Circuit rejected the warrantless search of the camper as an incident to an arrest for the traffic violation. It upheld it, however, on the basis of the arrest for possession of burglary tools. The burglary tools were not discovered until:

(a) Petitioners had been placed in the cruiser;

(b) The trooper had forced open the camper and found electrical blasting caps in the boxes;

(c) They then searched the cab and found the burglary tools;

(d) Petitioners were found not guilty by the Perry Circuit Court of possession of burglary tools.

(3) Assuming arguendo that probable cause existed for the warrantless search there were no exigent circumstances. Petitioners had previously been placed under arrest and in the police cruiser. Other officers had been called and were present in the area. Surely they had time to secure a warrant.

We therefore submit that the officers lacked probable cause and that the conclusion arrived at by the Court of Appeals of Kentucky is the proper ruling to be applied to this factual situation. But if probable cause actually existed we feel that the facts of this case, and the Tenth Amendment to the Constitution

of the United States of America would require this Court to adopt the ruling of the Court of Appeals of Kentucky. It should be remembered that the stop, search and seizure were executed by Kentucky officers in Perry County for the alleged violation of Kentucky offenses. All of this is strictly state matters. Evidence of the federal violation occurred after the illegal intrusion.

We further submit that the Perry Circuit Court's holding that the tire tool and bolt cutters were not burglary tools was binding not only on the state courts, but upon the District Court and this evidence should have been excluded under the doctrine of Collateral Estoppel. We further submit that petitioners were denied a fair trial by the continued assertions by government witnesses that these tools were used to burglarize the R. C. Durr powder magazine.

II. THE WRIT SHOULD ISSUE BECAUSE PETITIONERS' SIXTH AMENDMENT RIGHTS WERE VIOLATED IN NOT TRYING THEIR CASE AT THE JACKSON DIVISION OF THE COURT.

Our founding fathers had felt the sting of oppression and tyranny by the Crown's willy-nilly transfer of criminal trials. They complained of this in the "DECLARATION OF INDEPENDENCE". To make sure that the citizens of this new nation would be free from similar oppression by their new

government they inserted two provisions in the Constitution. Article 3, §2, para 3 provides that "The trial of all crimes * * * *, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed; * * * *". Article 6 of the Amendments provides "In all criminal prosecutions the accused shall enjoy the right to a speedy trial * * * * by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, * * * *". What has been done by the Congress and the rule making authority of this Court to carry out these requirements?

First Congress has said in 28 USC 97(a) "Court * * * * shall be held at * * * * Jackson." Jackson is only 30 miles from where the alleged incident occurred and where petitioners and their witnesses resided. Yet the Trial Court refused to try petitioners at Jackson. This Court in the case of *Rosencrans* v. *United States,* 17 S. Ct. 302, 165 U.S. 257, 41 L. ed 708 said:

> "The creation of divisions and the multiplication of places of trial are for the convenience of litigants, bringing the trial nearer to them and their witnesses."

Again in the case of *United States* v. *Johnson,* 323 U.S. 273, 276, 89 L.ed 236, Judge Frankfurter eloquently stated the precept when he said:

> "Questions of venue in criminal cases * * * * are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

This is not all Congress has done to ascertain the place of trial. It enacted 18 USC 3240. This required a trial to be held in the original district or division if the county or territory had been transferred after the commission of the alleged offense. Here Perry County was transferred to the Pikeville Division on January 3, 1973. It would appear to us that the statute is plain and that this alone would require the Court to conduct the trial at Jackson.

More recently Congress enacted the Jury Selection Act. 28 USC 1861. That statute set forth the policy of this nation that all litigants in federal courts entitled to a jury trial should have the right to a petit jury selected at random from a fair cross-section of the community. This Court recently in the case of *Taylor* v. *State of Louisiana*, No. 73-5744, decided January 21, 1975, in discussing the Jury Selection Act stated:

> We accept the fair cross-section requirement as fundamental to the jury trial guaranteed by the

> Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . The broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."

This Court reversed the Taylor conviction because the jury was not composed of a cross-section of the community wherein the Court convened. Not only were we denied trial by a jury drawn from a fair cross section of the community, we were even denied a trial in the community of the Jackson Division of the District Court.

There is yet another mandate dealing with place of trial. FRCP 18 authorizes the Court to fix the place of trial within the district, but it must give due regard to the convenience of the defendant and witnesses. The order entered during each of these transfers was entered ex parte. At no time were petitioners given an opportunity to be heard prior to the transfers. The Court assigned as reason for the transfers the speedy trial requirement of the Sixth Amendment. We submit that the Sixth Amendment has other requirements equally as important to an accused. His right of counsel, witnesses and the place of trial are equally as important and should be balanced together.

The Fifth Circuit in the case of *Dupoint* v. *United States*, 388 F. 2d 39, 44, in discussing this rule said:

> "* * * * it is not to be done except with due regard for the defendant's convenience and that of the witnesses. The convenience of the Government is not a factor. As evidenced by the Constitutional requirement that none shall be prosecuted outside the district in which the offense is committed, it is the public policy of this Country that one must not arbitrarily by sent, without his consent, into a strange locality to defend himself against the powerful prosecutorial resources of the Government."

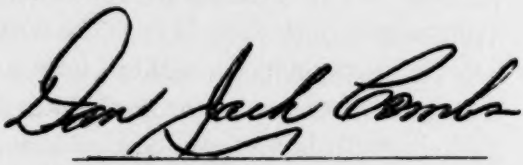
The Courts below rejected each of these — place of trial arguments — by simply holding that because

the word "division" was not used by Congress in 28 USC 97(a) that the rules and statutes were not applicable to the case at bar. It is true that other circuits have arrived at a similar conclusion for the same reasons. But we submit that this reasoning is fallacious. The word "division" has no magical connotation. It is synonymous with "the place where the Court convenes". Congress had said that the Eastern District Court should convene at Jackson. The lower Court held that "The District Court did not violate appellants rights secured by Rule 18 in trying them at Lexington and Pikeville instead of at Jackson." Rule 18 gave petitioners no rights. The only rights we have are natural rights and those guaranteed by the Constitution. This rule, however, requires the Courts to recognize those rights and afford them a trial at a place within the district with due regard to their convenience and their witnesses.

CONCLUSION

For these reasons we respectfully urge the Court to grant a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit and to rectify the grievous constitutional errors committed by that Court.

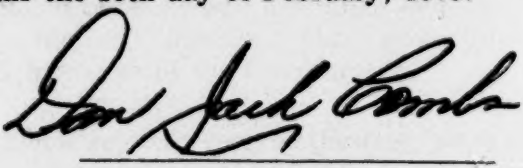
Respectfully submitted,



Dan Jack Combs
Counsel for Petitioner
207 Caroline Avenue
Pikeville, Kentucky 41501

CERTIFICATE OF SERVICE

Pursuant to U. S. Sup. Ct. Rule 33 (3), I hereby certify that two copies of the foregoing Petition for Writ of Certiorari was mailed to the Honorable Eugene E. Siler, Jr., United States Attorney, P. O. Box 1490, Lexington, Kentucky 40501, Attorney for Respondents, this the 10th day of February, 1975.



Dan Jack Combs

No. 74-1242

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

UNITED STATES OF AMERICA, ... *Plaintiff-Appellee,*

v.

JOE LEWIS AND
TOMMY ALLEN COMBS, ... *Defendants-Appellants.*

Appeal from the United States District Court
for the Eastern District of Kentucky

Decided and Filed October 8, 1974.

Before PHILLIPS, Chief Judge, and WEICK and ENGEL, Circuit Judges.

PHILLIPS, Chief Judge. Joe Lewis and Tommy Allen Combs appeal from a jury conviction for transporting stolen explosive materials in violation of 18 U.S.C. § 842(h).[1] We affirm.

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1. 18 U.S.C. § 842(h) provides as follows:
"It shall be unlawful for any person to receive, conceal, transport, ship, store, barter, sell, or dispose of any explosive materials knowing or having reasonable cause to believe that such explosive materials were stolen."

I. Facts

About midnight on Sunday, September 3, 1972, two Kentucky state policemen were in a rural area of Perry County investigating a "drunk complaint of a pickup truck that was supposed to be red." A red Chevrolet pickup truck with a white homemade camper on it soon passed their police cruiser. The officers further noticed that the pickup had defective tail lights and a loud muffler.

The officer driving the police cruiser turned on his blue rotating beacon and the pickup pulled off to the side of the road and stopped. The police officers parked approximately six to eight feet directly behind the pickup and apparently left their cruiser's headlights on as they walked toward the pickup. At the request of the officers the driver of the pickup, the appellant Lewis, displayed his driver's license. One of the officers testified that he gave Lewis a traffic citation for defective tail lights and muffler, presumably in violation of K.R.S. §§ 189.050 and 189.140 respectively. The appellant Combs was a passenger in the pickup.

As the officers initially approached the pickup from the rear, they saw through the window in the rear of the camper some boxes labeled "danger electrical blasting caps."[2] After ordering the appellants to get

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2. There was varying testimony as to the exact label on the boxes. "Danger electrical blasting caps," or something closely approximating that, appears to have been the most likely marking on the boxes.

out of the pickup, the officers inquired as to what the appellants were hauling. The appellants disclaimed any knowledge of the contents of the camper, saying that the pickup was owned by another person. Appellant Lewis was then asked to open the rear door of the camper. He refused and told the officers that if they wanted it opened to do it themselves.

The officers then searched the appellants, advised them of their rights and placed them in the police cruiser. While one officer remained in the cruiser with the arrestees, another searched the pickup which appeared to be heavily loaded. He found a large quantity of electrical dynamite caps in the rear and two rifles, one tire tool and a pair of bolt cutters in the cab. It was later determined that the boxes found in the rear of the pickup contained over 1,800 blasting caps, which were valued at approximately $2,000. The next morning the officers discovered that a large quantity of blasting caps were missing from the magazine of a construction company in a nearby county.

Prior to the trial in the District Court, the appellants were tried in state court on two separate charges. They were found not guilty in Perry Circuit Court on the charge of possession of burglary tools. However, they were found guilty in Leslie Circuit Court of the offense of breaking and entering the construction company's magazine and carrying away therefrom electrical blasting caps.

II. Judicial Administration Issues

On appeal from their conviction in the District Court, Appellants raise numerous assignments of error. Of primary importance are three alleged errors of judicial administration and procedure.

The genesis of each of these three alleged errors is appellants' claim that they were moved "from pillow to post" within the Eastern District of Kentucky with no regard to their convenience or the convenience of witnesses. The following table presents a summary of relevant actions taken in this case, the date, and the location within the district at which the action was taken.

Action	Date	Location
1. Indictment returned	November 8, 1972	Jackson
2. Arraignment	November 15, 1972	Pikeville
3. Action transferred from Jackson docket to Pikeville docket	December 15, 1972	
4. Hearing on suppression motion	February 15, 1973	London
5. Further hearing on suppression motion	May 14, 1973	Pikeville
6. Action transferred from Pikeville docket to Lexington docket	August 1, 1973	
7. Jury trial resulting in hung jury; Action subsequently reassigned to Pikeville docket	Sept. 10-12, 1973	Lexington
8. Jury trial resulting in conviction	Oct. 29-31, 1973	Pikeville

(A) Appellants contend that the District Court violated the following venue requirement of Fed. R. Crim. P. 18: "The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses." Prior to the beginning of their first trial in Lexington, on September 10, 1973, appellants moved to dismiss the indictment or, in the alternative, for an order "staying all proceedings against them in any division of this Court except the Jackson Division, and staying any trial by any jury other than a jury drawn from the counties comprising the Jackson Division of this Court." Appellants maintain throughout their brief and oral argument that Jackson is a division of the Eastern District of Kentucky. As more fully discussed in II (B) below, this contention is erroneous. 28 U.S.C. § 97 (a).

Although the District Court later overruled the motion to dismiss the indictment, it did not rule on the alternative motion to stay all proceedings except those at Jackson. In support of their alternative motion, appellants stated that they were residents of Perry County, that the alleged offense occurred in Perry County, that practically all of the witnesses resided in Perry County, and that Perry County was some 30 miles from Jackson and some 120 miles from Lexington. Pikeville, the location of the second trial, is said to be some 80 miles from Jackson.

Appellants rely on *Dupoint* v. *United States*, 388 F.2d 39 (5th Cir. 1967), in which a conviction was reversed where the prosecution of a federal crime was transferred 42 miles farther from the scene of the alleged offense for the convenience of the prosecution, and not for the convenience of the defendant or witnesses. The Government asserts that *Dupoint* is distinguishable on the ground that the Middle District of Georgia, where the *Dupoint* case arose, is divided by statute into several divisions, 28 U.S.C. § 90(b), unlike the Eastern District of Kentucky where there are no divisions. 28 U.S.C. § 97(a).

We regard this as a relatively close issue and do not believe that the distinction between this case and *Dupoint* cited by the Government is dispositive. The existence or nonexistence of division lines within a federal judicial district cannot be held to determine a question of whether venue properly exists at a particular location within the district. Indeed, a 1966 amendment of Fed. R. Crim. P. 18 deleted a provision reading, "but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed." In eliminating the requirement of division venue, the 1966 amendment recognized that the presence of venue at a particular place is controlled by numerous factors, e.g., proximity of defendant's residence, proximity of witnesses and counsel, docket conditions which bear on whether a defendant receives a speedy trial, and

proximity of records and documents, and should not be hemmed in by artificial boundary lines drawn by Congress.[3]

Rule 18 merely states the traditional rule of "forum non conveniens" and vests discretion in the District Court to determine the proper place of trial. *Houston* v. *United States,* 419 F.2d 30, 33 (5th Cir. 1969). Trial judges traditionally have been held to have wide discretion in disposing of change of venue motions. *Platt* v. *Minnesota Mining & Mfg. Co.,* 376 U.S. 240, 245 (1964); *United States* v. *Projansky,* 465 F.2d 123, 139 (2d Cir.), *cert. den.,* 409 U.S. 1006 (1972); *Wagner* v. *United States,* 416 F.2d 558, 561-62 (9th Cir. 1969), *cert. den.,* 397 U.S. 923, 1015 (1970); *United States* v. *Aronson,* 319 F.2d 48, 52 (2d Cir.), *cert. den.,* 375 U.S. 920 (1963). However, that discretion cannot be used as an excuse not to give "due regard to the convenience of the defendant and

3. The Advisory Committee Note to the 1966 amendment of Rule 18 says in part: "The former requirement for venue within the division operated in an irrational fashion. Divisions have been created in only half the districts, and the differentiation between those districts with and those without divisions often bears no relationship to comparative size or population. In many districts a single judge is required to sit in several divisions and only brief and infrequent terms may be held in particular divisions. As a consequence under the original rule there was often undue delay in the disposition of criminal cases — delay which was particularly serious with respect to defendants who had been unable to secure release on bail pending the holding of the next term of court."

the witnesses" in fixing the place of trial. Fed. R. Crim. P. 18.

Within the circumstances of this case, we hold that the District Court did not violate appellants' rights secured by Rule 18 in trying appellants at Lexington and Pikeville instead of at Jackson. The assignment of cases within a district is a matter within the exclusive domain of the local district judges. Transfer of a particular case from one place within the district to another place within the district is a matter for the local district judges to decide, and the assent of a defendant to such a transfer is not required.

Other circuits have reached results consistent with our decision of the Rule 18 issue. For example, in *United States* v. *Clark*, 416 F.2d 63, 64 (1969), the Ninth Circuit held that after one federal trial ended in a mistrial and a second trial was held 90 miles away at another location in a district not divided into divisions, the change in place of trial was not an impermissible change in venue. The Second Circuit in *United States* v. *Fernandez*, 480 F.2d 726, 730 (1973), relying on the 1966 amendment to Rule 18 which eliminated division venue, stated that it follows *a fortiori* that when a district is not separated into divisions that trial at any place within the district is allowable under the Sixth Amendment[4] and

4. The Sixth Amendment provides in part "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *."

Rule 18. See also, *United States* v. *Wilson*, 368 F.2d 842, 843 (1966), in which the Second Circuit held that because the District of Connecticut was not divided into divisions no order of transfer was required for trial at a location within the district different from the location at which the defendant was arraigned.

(B) Appellants next contend that the District Court's transfer of this case to Pikeville violated the following provision of 18 U.S.C. § 3240:

> "Whenever any new district or division is established, or any county or territory is transferred from one district or division to another district or division, prosecutions for offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred. . . ."

In an order, entitled "In The Matter of Reassignment of Counties to The Catlettsburg, Lexington and Pikeville Jury Divisions,"[5] the three District Judges of the Eastern District of Kentucky on December 15, 1972, transferred all pending cases on the Jackson

5. The phrase "jury division," as used here, refers to the court created grouping of counties into units for the admininstrative purpose of selecting names to be placed in the master jury wheel of the district. The phrase does not refer to any congressionally created divisions in the Eastern District of Kentucky.

docket which arose in Perry County to the Pikeville docket. The judges indicated that transfer of these cases, then 17 in number, would provide for more expeditious disposition of the business of the District Court.

Appellants' contention that § 3240 required that they be tried at Jackson is meritless. Their argument is premised on the mistaken belief that Jackson is a division of the Eastern District of Kentucky. 28 U.S.C. § 97(a) merely names Jackson as one of eight locations in the Eastern District for the holding of court. The statute does not create divisions in the Eastern District of Kentucky as they exist in some other federal judicial districts. Thus when the District Court on December 15, 1972, transferred all pending cases on the Jackson docket that arose in Perry County to the Pikeville docket (including the instant one), it did not transfer the cases from one division to another division within the meaning of § 3240.

(C) Appellants also contend that their trials at Lexington and Pikeville by panels of jurors selected at large from the Eastern District of Kentucky violated the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861, *et seq.* The gravamen of their claim here is that the selection of jurors from the district at large contravenes provisions in the Jury Selection Plan of the Eastern District of Kentucky (the Plan), which was promulgated pursuant to 28 U.S.C. § 1863.

The Jury Selection Plan of the Eastern District of Kentucky was drafted by the judges of that court. It was approved as of September 23, 1968, by the Reviewing Panel provided for in 28 U.S.C. § 1863(a), which panel included the members of the Judicial Council of the Sixth Circuit.

Section Seven is the primary provision in the Plan challenged by appellants. It provides as follows:

> "On individual request, any judge of the court may excuse a juror on finding that such service would entail undue hardship or extreme inconvenience if the juror resides at a distance more than 70 miles from the place of holding court."

This provision of the Plan is entirely consistent with 28 U.S.C. § 1863(b)(7) which directs the District Court to establish a plan which would "fix the distance, either in miles or in travel time, from each place of holding court beyond which prospective jurors residing shall, *on individual request therefor,* be excused from jury service. . . ."(Emphasis supplied.) There is nothing in the record of this case to indicate that any of the jurors selected at large from the district who heard this case requested to be excused from jury duty or that any such request was denied.

Further, appellants' claim that Section Seven of the Jury Selection Plan violates the 28 U.S.C. § 1861 declaration of policy that juries be selected at random from a fair cross section "of the community in the

district or division wherein the court convenes" is equally meritless. A paragraph in Section Five of the Plan provides as follows: "Jurors from any part of the district may be required to serve at any of the places where court is held." Thus the Plan specifically sanctions the practice of selecting jurors from the district at large."

The present case, by an order dated August 1, 1973, was transferred from the Pikeville docket to the Lexington docket to be tried by a jury panel drawn from the district at large. After noting the large number of cases pending on the Pikeville docket and the defendants' interest in a speedy trial,[6] the District Court in that order stated: "[T]he Court's schedule is such that a more orderly and efficient disposition of these cases could be experienced at a central location and with a jury panel drawn from the district at large."

Accordingly, we hold that the provision in Section Five of the Jury Selection Plan permitting jurors to be drawn from the district at large does not violate any of appellants' rights and is compatible with the 28 U.S.C. § 1861 requirement that the jury be drawn from "the community in the district or division wherein the court convenes." The Section Five provision does not in practice operate in a vacuum. It operates in conjunction with Section Seven of the Plan which under certain circumstances permits prospective jurors to be excused

6. This case had been pending on the Pikeville docket for over seven months prior to its transfer to the Lexington docket.

if they reside more than 70 miles from the place of holding court.

III. Criminal Procedure Issues

In addition to the judicial administration issues, several issues of criminal procedure are raised by appellants. We find these contentions also to be without merit.

(A) Appellants assert that the warrantless search of their truck by the Kentucky state police officers and the seizure of the blasting caps and other items violated their Fourth Amendment rights. The Government contends that once the police officers in the course of issuing a traffic citation spotted the boxes labeled "danger electrical blasting caps" (or language substantially to that effect) in the camper, then justification existed for the warrantless search and seizure. For the reasons set forth below, we agree with the Government's position under the circumstances of this case.

(1) The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable." *Carroll* v. *United States*, 267 U.S. 132, 147 (1925). See also *Terry* v. *Ohio*, 392 U.S. 1, 20-27 (1968).

It is universally accepted that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." *Terry* v. *Ohio, supra*, 392 U.S. at 20. Searches conducted without a warrant are per se unreasonable under the Fourth Amendment, except in "a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 357 (1967). Among the exceptions arguably relevant to this case are searches for evidence in plain view of a police officer justified in being where he is, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465-72 (1971); *Harris* v. *United States*, 390 U.S. 234, 236 (1968), searches in certain exigent circumstances, *Warden* v. *Hayden*, 387 U.S. 294, 298-99 (1967); *McDonald* v. *United States*, 335 U.S. 451, 454-55 (1948), searches of a moving vehicle, *Carroll* v. *United States, supra*, and searches incident to a lawful arrest, *Chimel* v. *California*, 395 U.S. 752 (1969); *Agnello* v. *United States*, 269 U.S. 20 (1925). In a recent case, *United States* v. *Robinson*, 414 U.S. 218, 235 (1973), the Supreme Court held that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."

No amount of probable cause can justify a warrantless search or seizure absent one of the exceptions. *Coolidge* v. *New Hampshire, supra,* 403 U.S. at 468. Similarly, use of each of the exceptions to justify a warrantless search hinges on the presence of probable cause to search. See, e.g., *Chambers* v. *Maroney,* 399 U.S. 42, 48 (1970); *Carroll* v. *United States, supra,* 267 U.S. at 155-59; and the Court's statement in *Almeida-Sanchez* v. *United States,* 413 U.S. 266, 269 (1973), "Automobile or no automobile, there must be probable cause for the search."

> "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Carroll* v. *United States, supra,* 267 U.S. at 162.

Probable cause means "more than bare suspicion." *Brinegar* v. *United States,* 338 U.S. 160, 175 (1949). It means "a reasonable ground for belief of guilt." *Id.*

(2) In the present case, the state police officers aided by the beam from their cruiser's headlights observed the marked boxes through the window in the camper as they approached the pickup. If this observation constituted a search, it clearly was a reasonable one within the circumstances of this case. *Terry* v. *Ohio, supra,* 392 U.S. at 21-22; *United States*

v. *Booker*, 461 F.2d 990, 992, 993 (6th Cir. 1972) (majority and concurring opinions). Nothing in the Fourth Amendment could be held to require police officers stopping a vehicle in the middle of the night in order to issue a traffic citation to turn off their cruiser's headlights before approaching the stopped vehicle. *United States* v. *Robinson*, 414 U.S. 218, 234, n. 5 (1973), emphasizes the danger of assaults on police officers in the course of making arrests for such traffic offenses.

(3) After the officers in the present case observed the marked boxes, they proceeded to the front of the pickup where they asked the driver, appellant Lewis, for his license. While standing at the front of the truck, the officers noticed two rifles and certain tools in the cab of the truck.

Concerning the sequence of events after the officers reached the front of the truck, Trooper Alexander Collins, one of the two officers, testified as follows in Perry Magistrate's Court, District #2:

> "A. Well, we asked to see the operator's license, of Mr. Lewis. At this time I didn't know the reputation of these people, but Trooper Thompson seemed to know them fairly well, and since they did have weapons in the truck and tools, we asked them to get in the cruiser and he placed them under arrest and give them their rights.
>
> "Q.25 What did he arrest them for?
>
> "A. Possession of burglary tools.

"Q. 26 Are those the tools that he arrested them for?

"A. Yes, sir, they are.

"Q.27 And that's a conventional lug wrench and a conventional set of bolt cutters?

"A. Yes, sir."

Trooper Leroy Thompson was the only one of the two arresting officers to testify in the trial at the District Court. He was not asked expressly if he and Trooper Collins observed the rifles and burglary tools at the time they were at the front of the pickup. However, he testified that the two rifles were standing upright in the middle of the cab and the tire tool and the bolt cutters were in the floor (as opposed to being under the seat). Thus the rifle and tools were positioned in readily observable locations.

With respect to why appellants were placed under arrest, Trooper Thompson was questioned as follows in the Magistrate's Court:

"Q.9 And when you placed them under arrest over at Busy, in Perry County, Kentucky, what did you advise them at that time that you were arresting them for?

"A. At the time I advised them: because of the tail lamps, because of the loud muffler, because of the burglary tools, and also because of the dynamite, but I didn't bring the dynamite charges against them. That case was taken by Detective Jarvis, and also AT&F agent, Larry Hatton."

On cross examination in the Magistrate's Court Trooper Thompson further testified:

> "Q.48 Why did you arrest the pasenger if you — if the original charge was strictly a loud muffler and tail light?
>
> A. Because I seen the dynamite caps, because the vehicle that was hauling them was not marked as such, because in my belief they were stolen."

This testimony contains one of the few references in the record to the fact that appellants by the mere act of transporting the explosive materials without either the marking "Explosives" or "Danger" on the side of the pickup were committing a state statutory offense. K.R.S. § 189.160. The federal statute, 18 U.S.C. § 842(h), on the other hand, only makes it illegal to transport explosive materials if they are stolen. The appellants were never charged with a violation of K.R.S. § 189.160.

(4) We come now to the question of whether probable cause existed for the search of the camper. Nothing in the federal statute, 18 U.S.C. § 842(h), makes it illegal to transport blasting caps. Appellants' pickup carried a sign "General Construction Company." The police officers had no knowledge at the time of the arrest that blasting caps were missing from a construction company's magazine in a nearby county. The theft was not discovered until the next morning.

The officers were not in the neighborhood investigating construction company thefts. They were staked out on a drunkenness complaint.

On the other hand, the officers noticed this heavily loaded pickup (not a transport truck as is uaually required to carry explosive materials) traveling in a rural area of eastern Kentucky about midnight on a Sunday night of a Labor Day weekend. Further, the officers noticed a large supply of electrical blasting caps in the camper and appellants refused to state what was in the camper and declined to open the camper for the officers to inspect. The officers noticed two rifles and muddied tools which in their opinion were burglary tools. Considering these circumstances balanced against those in the previous paragraph, we hold that the officers had probable cause to search the camper. They had more than a "bare suspicion" that the blasting caps were stolen.

(5) Given the presence of probable cause to search the camper, were the officers required by the Fourth Amendment to obtain a warrant prior to the search? For the reasons set forth below, we think not.

First, the marked boxes, which contained the stolen blasting caps and which were seized from the camper, were in "plain view" of the officers. *Coolidge* v. *New Hampshire, supra,* 403 U.S. at 465-72; *Harris* v. *United States, supra,* 390 U.S. at 236.

> "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." *Coolidge* v. *New Hampshire, supra,* 403 U.S. at 466.

The officers in the present case were justified in intruding on the appellants to issue them a traffic citation. In the routine performance of their duties, they saw the incriminating evidence.

Second, exigent circumstances in the present case rendered it impractical for the officers to obtain a warrant and justified the warrantless search, *Warden* v. *Hayden, supra,* 387 U.S. at 298-99; *McDonald* v. *United States, supra,* 335 U.S. at 454-55. In denying a motion to suppress the blasting caps the District Court listed the following factors which constituted exigent circumstances: 1) the presence of inherently dangerous explosives, 2) the officers' concern that dynamite might be stored along with the blasting caps (a wrecker operator refused to two the truck), 3) the hour of night (about midnight), 4) the knowledge by one of the officers that at least one of the appellants was an ex-convict, and 5) the mobility of the vehicle.

Further, the circumstances of this case fit within the exception to the warrant requirement that permits a search of an automobile on the highway where there is probable cause to support the search and "where it is not practicable to secure a warrant because the vehicle

can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll* v. *United States, supra,* 267 U.S. at 153. *See also Coolidge* v. *New Hampshire, supra; Chambers* v. *Maroney, supra; Dyke* v. *Taylor Implement Mfg. Co.,* 391 U.S. 216 (1968).

The officers assuredly would have been derelict in their duties if, while believing that explosives were in the camper, they had taken appellants to jail and left the pickup abandoned in this rural area. The Supreme Court held recently in *Cady* v. *Dombrowski,* 413 U.S. 433, 448 (1973) that where the trunk of an automobile which an officer reasonable believed to contain a gun was vulnerable to intrusion by vandals, the search of the trunk was not unreasonable within the meaning of the Fourth Amendment.

Finally, the Government contends that the warrantless search of the camper was justified because it was incident to a lawful arrest. *Chimel* v. *California, supra; Agnello* v. *United States, supra.* Initially, we should note that the arrest must be a lawful one in order to justify the search. *Manning* v. *Jarnigan,* ——F.2d——, No. 73-1463 (6th Cir. July 30, 1974). Moreover, the rule of this court was stated in *Stidham* v. *Wingo,* 452 F.2d 837, 841, (6th Cir. 1971), in which we quoted approvingly the following language of Chief Judge Murrah in *United States* v. *Humphrey,* 409 F.2d 1055 (10th Cir. 1969):

> "We are in complete agreement with the prevailing federal and state authority which condemns the search of persons and automobiles following routine traffic violations. Such searches can only be justified in exceptional, on the spot circumstances which rise to the dignity of probable cause."

Subsequent to *Stidham*, the Supreme Court in the companion cases of *United States* v. *Robinson, supra,* and *Gustafson* v. *Florida,* 414 U.S. 260 (1973), sanctioned wider search of the person incident to traffic violations. In both cases probable cause was either conceded or clearly present. In *United States* v. *Robinson,* a police officer made a custodial arrest of a traffic offender for driving while his license was revoked. The officer made a search of the offender's person, in the course of which he found in an inside coat pocket a cigarette package containing heroin. The Supreme Court held that the heroin was admitted into evidence lawfully in the traffic offender's subsequent trial for a drug offense, saying that the search was not only incident to a lawful arrest but was also reasonable. Similarly, in *Gustafson* v. *Florida,* during the course of a patdown search of the person of a traffic offender who had been arrested for not having his driver's license in his possession, the arresting officer seized some marihuana cigarettes. The Supreme Court upheld this search and seizure on the same grounds stated in *United States* v. *Robinson. See also United States* v. *Edwards,* ——U.S.——, 42 U.S.L.W. 4463 (U.S.

March 26, 1974), for an even more recent statement by the Supreme Court on the validity of a search incident to an arrest.

In neither *United States* v. *Robinson* nor *Gustafson* v. *Florida* was any issue raised as to a warrantless search of the *vehicle* (as opposed to the person) subsequent to arrest for a traffic offense. Accordingly, if the appellants in this case had been arrested solely for the traffic offense of defective tail lights and loud muffler,[7] we would adhere to the rule in *Stidham* and decline to uphold the warrantless search of the camper as one properly conducted incident to an arrest for a traffic offense.

On the other hand, there is evidence from which the District Court could conclude that appellants were arrested for the traffic offenses and for the possession of burglary tools, or solely for the possession of burglary tools as suggested at one time by one of the officers in Perry Magistrate's Court. Considering all the exceptional circumstances of this case recited above, we hold the warrantless search of the camper was justified as being incident to the arrest for possession of burglary tools.

(B) Appellants next contend that the District Court erred in permitting the Government to introduce

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7. As indicated by the testimony recited in III(A)(3) of this opinion, there exists some uncertainty as to the exact offense for which appellants were arrested.

into evidence a pair of bolt cutters and a tire tool because they were obtained without a warrant from Kentucky police officers. The Kentucky officers had used this evidence in two earlier prosecutions of appellants in Kentucky state courts. The appellants filed a motion for the return of the items after the first state trial.

This court previously has disposed of this issue in *United States* v. *Gargotto*, 476 F.2d 1009, 1014 (1973), in which we stated as follows:

> "Evidence legally obtained by one police agency may be made available to other such agencies without a warrant, even for a use different from that for which it was originally taken. Gullett v. United States, 387 F.2d 307 (8th Cir. 1967), cert. denied 390 U.S. 1044, 88 S.Ct. 1645, 20 L.Ed. 2d 307 (1968)."

The fact that a motion has been filed for the return of the evidence has no bearing on the rule that one police agency need not get a warrant prior to obtaining evidence from another police agency.

(C) Appellants contend finally that the District Court erred to their prejudice in permitting the Government to introduce evidence in attempting to prove that appellants had stolen the blasting caps from a construction company's magazine. The claimed prejudice is that it would indicate to the jury their prior

conviction in Leslie Circuit Court on a charge of breaking and entering.

To prove a violation of 18 U.S.C. § 842(h), the Government had to show that appellants knew or had reasonable cause to believe that the blasting caps were stolen. Consequently, the prosecution had to prove a theft. Evidence that the appellants committed the burglary of the magazine was properly admissible as proof of the scienter required by 18 U.S.C. § 842(h).

Appellants' reliance on *United States* v. *Baker*, 494 F.2d 1262 (6th Cir. 1974) is misfounded. In that case, it was conceded that the evidence which we found prejudicial was "not relevant to proving the crime charged." 494 F.2d at 1265. In the present case, the evidence of the burglary was directly related to the offense charged.

Affirmed.

Filed Jan. 15, 1975

No. 74-1242

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

UNITED STATES OF AMERICA, ... *Plaintiff-Appellee,*

v.

JOE LEWIS AND
TOMMY ALLEN COMBS, ... *Defendants-Appellants.*

ORDER

Before PHILLIPS, Chief Judge, and WEICK and ENGEL, Circuit Judges.

No judge of the court having moved for rehearing in banc, the petition for rehearing has been considered by the original hearing panel.

It is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

CLERK

RENDERED: SEPTEMBER 27, 1974

COURT OF APPEALS OF KENTUCKY

74-178

TOMMY ALLEN COMBS
AND JOE LEWIS ..... APPELLANTS

V.

COMMONWEALTH
OF KENTUCKY ..... APPELLEE

Appeal From Leslie Circuit Court
Honorable Clay M. Bishop, Judge
Indictment No. 4056F

MEMORANDUM OPINION PER CURIAM

REVERSING

(Not to be cited as authority)

The appellants' motion to suppress the evidence obtained as the result of a search claimed by them to have been unlawful should have been sustained.

Large boxes labeled "Dynamite Electrical Blasting Caps. Dangerous." were visible in appellants' truck at the time appellants were stopped by the officers

because of a defective taillight on the truck. That fact did not constitute probable cause for a belief on the part of the officers that appellants had committed a crime or that the truck contained contraband. The search of the truck at that time without warrant was unauthorized.

We do not consider Commonwealth v. Hagan, Ky., 464 S.W. 2d 261 (1971), or Scillion v. Commonwealth, Ky., 487 S.W. 2d 288 (1974), applicable to the facts of this case.

We find no merit in the other allegations of error advanced by appellants.

The judgment is reversed for further proceedings in conformity with this opinion.

All concur.

ATTORNEY FOR APPELLANTS:

Dan Jack Combs
207 Caroline Avenue
Pikeville, Kentucky 41501

ATTORNEYS FOR APPELLEE:

Ed W. Hancock
Attorney General
Frankfort, Kentucky 40601

Robert W. Riley
Assistant Attorney General
Frankfort, Kentucky 40601

FILED DEC. 15, 1972

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

In The Matter Of Reassignment Of Counties To The Catlettsburg, Lexington And Pikeville Jury Divisions

It appearing to the Court that the disposition of the business of the Court may be more expeditious and for other reasons deemed practical, on and after January 2, 1973,

It is ORDERED:

1. Fleming County will be assigned to the Catlettsburg Jury Division.

2. Powell County will be assigned to the Lexington Jury Division.

3. Perry County will be assigned to the Pikeville Jury Division.

4. Morgan County will be assigned to the Catlettsburg Jury Division.

5. All cases which arose in Fleming County pending on the Lexington Docket will be transferred to the Catlettsburg Docket of this court on January 2, 1973.

6. All cases pending in this court which arose in Powell County on the Jackson Docket will be transferred to the Lexington Docket on Januray 2, 1973.

7. All cases pending on the Jackson Docket which arose in Perry County will be transferred to the Pikeville Docket on January 2, 1973.

8. All cases pending on the Jackson Docket of this court which arose in Morgan County will be transferred to the Pikeville Docket on January 2, 1973.

9. The Clerk shall mail copies of this Order to each attorney of record in any case transferred by reason of this Order.

/s/ Bernard T. Moynahan, Jr.
Bernard T. Moynahan, Jr.,
Chief Judge

/s/ Mac Swinford
Mac Swinford, Judge

/s/ H. David Hermansdorfer
H. David Hermansdorfer,
Judge

A True Copy Attest
Davis T. McGarvey, Clerk
U. S. District Court
By /s/ Julia A. Wallace
D. C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

Pikeville No. 2889

UNITED STATES OF AMERICA ..... PLAINTIFF

VS:

JOE LEWIS AND
TOMMY ALLEN COMBS ..... DEFENDANTS

MOTION

* * * * *

Come defendants, by counsel, and object to the entry of an order transferring this cause for trial at Lexington by a jury drawn from the Eastern District of Kentucky.

Defendants, pursuant to Title 28 U.S.C. 1867 (a), respectfully move the Court for the entry of an order dismissing the indictment against them.

In the alternative, they respectfully move the Court for the entry of an order staying all proceedings against them in any division of this Court except the Jackson Division, and staying any

trial by any jury other than a jury drawn from the counties comprising the Jackson Division of this Court.

As ground therefor, defendants say that at all times herein mentioned, they were citizens and residents of Hazard, Perry County, Kentucky; that the alleged offense occurred near Hazard, Perry County, Kentucky, and that they were indicted at Jackson by a grand jury drawn from the Jackson Division on the ____ day of _____, 1972.

That without an application having been made by either of these defendants, and contrary to Title 18 U.S.C. 3240, these cases were transferred to the Pikeville Division of this Court on January 12, 1973.

Defendants further state that contrary to the afore-mentioned statutes, and under Rule 18 of the Federal Rules of Criminal Procedure, this Court entered an order on August 1, 1973 transferring this cause to the Lexington Division of this Court for trial by a jury drawn from the entire Eastern District of Kentucky.

Defendants state that it is approximately 120 miles from their homes to Lexington and only approximately 30 miles from their homes to Jackson, and that practically all of the witnesses to the alleged offense reside in Hazard, Perry County, Kentucky, some 30 miles from Jackson and some 120 miles from Lexington.

That defendants' counsel resides at Pikeville, and that they can ill afford the expenses and fees necessary

to have their attorney journey to Lexington for trial; that trial at the Lexington Division is most inconvenient for them, and that pursuant to the foregoing Statutes and Rules, their case should be tried at Jackson by a jury drawn from that Division.

WHEREFORE, Defendants pray the appropriate order of the Court.

DAN JACK COMBS
Pikeville, Kentucky
Attorney for Defendants

I, DAN JACK COMBS, do hereby certify that a copy of the foregoing motion was this day delivered to HON. _____, Assistant United States District Attorney for the Eastern District of Kentucky, this the 10th day of September, 1973.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1006

JOE LEWIS AND TOMMY ALLEN COMBS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend (1) that the Tenth Amendment requires that this Court follow the decision of a state court in a case where there are conflicting state and federal appellate court decisions on the reasonableness of a particular search and seizure, (2) that the search and seizure here were in fact unreasonable, and (3) that the location of the trial at Pikeville rather than Jackson, Kentucky, both of which are within the Eastern District of Kentucky, violated 18 U.S.C. 3240 and the Sixth Amendment.

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioners were convicted of transporting stolen explosive materials, in violation of 18 U.S.C. 842(h). Each was sentenced to a four-year term of imprisonment subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed, 504 F.2d 92 (Pet. App. 1a-25a).

1. The evidence at trial showed that on September 3, 1972, Sunday night of Labor Day weekend, at about 11:40 p.m., two Kentucky state policemen were in a rural area of Perry County, Kentucky, investigating a complaint about a drunken driver in a red pickup truck (Tr. 8-11, 23, 42). The officers stopped a 1961 red Chevrolet pick-up truck that petitioner Lewis was driving and in which petitioner Combs was a passenger. The officers stopped the vehicle because it fit the description of the complaint, and because it had a loud muffler and no tail lights (Tr. 11). The truck had a home-made camper body on the back, was marked "General Construction Company," and appeared heavily laden (Tr. 31, 41). The officers parked their automobile six to eight feet behind the truck, its headlamps illuminating the rear of the truck (Tr. 11). As the officers approached the truck they observed boxes marked "Danger electrical blasting caps" through a window at the rear of the camper (Tr. 11; Pet. App. 2a, n. 2). At the front of the truck, Officer Thompson recognized petitioner Lewis, whom he knew was an ex-convict (Tr. 12, 34; Pet. App. 20a), and requested Lewis' driver's license. After the officer observed two .22 caliber rifles in the truck cab, he ordered both petitioners out of the truck (Tr. 12). When Officer Thompson asked petitioner Lewis what he was hauling (Tr. 265), Lewis replied that he did not know and that the truck did not belong to him (Tr. 266). Officer Thompson then asked Lewis to open the back of the truck and Lewis responded that he did not know how to open the back (Tr. 266), that he "had no authority to open it up" (Tr. 291), and that if Officer Thompson wanted it opened, he should open it himself (Tr. 12, 33, 266).

At this point, Officer Thompson opened the back of the truck, observed blasting caps in boxes, and placed petitioners under arrest (Tr. 12). Officer Thompson then

removed from the truck the two .22 caliber rifles, a tire tool, and a pair of bolt cutters lying on the floor of the cab in open view (Tr. 12, 50). Peitioners were then taken to the local jail (Tr. 58). Although a tow truck was called, for safety reasons the pickup truck was not towed but driven to an area where there were no houses (Tr. 60). The contents of the truck were then photographed, inventoried, and the more than 1,800 dynamite blasting caps discovered were removed to a powder magazine storage facility for safekeeping (Tr. 61; Pet. App. 3a).

Subsequently, the officers discovered that the blasting caps were stolen in a nearby county from the R. C. Durr Construction Company, a company for which petitioner Lewis had worked (Tr. 65-67, 152-153). At trial, the owner of the truck testified that there were no blasting caps in the back of the truck when he loaned it to petitioner Lewis (Tr. 247). Officer Thompson testified that petitioners were arrested for the traffic violations, for transporting the unmarked dynamite and for possession of burglary tools, *i.e.*, the tire tool and bolt cutters (Pet. App. 17a-18a).

2. By order dated December 15, 1972, the judges of the United States District Court for the Eastern District of Kentucky, in order to expedite the business of the court, eliminated Jackson, Kentucky, as a location in which the court would sit and reassigned petitioners' case, along with all the others then pending on the Jackson Docket which had arisen in Perry County, to Pikeville, Kentucky (Pet. App. 29a-30a). On August 1, 1973, the court again issued an order reassigning twenty-one cases because of overcroweded dockets and speedy trial problems (Pet. App. 32a). In its order that reassigned petitioners' case to Lexington, Kentucky, the court noted that it had given due consideration to each defendant and

to the witnesses in each case.[1] On September 10, 1973, petitioners objected to the transfer of their case from Jackson to Lexington on the ground that it involved extensive travel for "practically all of the witnesses" and "defendants' counsel resides at Pikeville, and that they can ill afford the expenses and fees necessary to have their attorney journey to Lexington for trial * * *" (Pet. App. 32a-33a). After petitioners' first trial ended in a jury disagreement on September 12, 1973, petitioners' case was reassigned to Pikeville, where they were then tried and convicted on October 29-31, 1973.

3. On September 27, 1974, eleven days before the decision of the court below, the Kentucky Court of Appeals reversed petitioners' state convictions for illegally breaking and entering the R. C. Durr Construction Company powder magazine on the ground that the blasting caps discovered in the back of the truck should have been suppressed because the arresting officers in the circumstances described above had no probable cause to believe that petitioners "had committed a crime or that the truck contained contraband" (516 S.W. 2d 105; Pet. App. 28a).

Petitioners contend (Pet. 9-12) that the Tenth Amendment requires that this Court follow the decision of the Kentucky Court of Appeals that the search of the red pickup truck was illegal (Pet. App. 27a-28a).[2] However,

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[1]We are lodging a copy of the district court's August 1, 1973, order with the Clerk of this Court.

[2]It is not clear whether the state court's decision rested upon the Fourth Amendment or Section 10 of the Kentucky Constitution, which provides:

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

federal courts are not required to follow state law respecting the search and seizure, as this Court stated in *Elkins* v. *United States*, 364 U.S. 206, 223-224:

> In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed.

Petitioners contend that the United States is collaterally estopped from asserting the validity of the search because of the decision of the Kentucky courts that the search was illegal. But the United States is a separate sovereign, was not a party to that proceeding, and is not estopped. Cf. *Bartkus* v. *Illinois*, 359 U.S. 121; *Abbate* v. *United States*, 359 U.S. 187.

4. Petitioners also contend (Pet. 10-11) that, on the facts of this case, the officers lacked probable cause to search the camper. That issue, which turns upon its particular facts and which the district court and the court of appeals resolved against petitioners, does not warrant further review. In any event, as we discuss hereafter, the search may be justified as an appropriate emergency measure to protect the public safety.

a. The officers stopped the petitioners' vehicle for traffic infractions at about midnight on a Sunday of a Labor Day weekend. They observed a large supply of blasting caps in the bed of the truck, which appeared heavily laden. They recognized one of the petitioners as a former convict and observed guns in the cab of the truck. Despite the obvious heavy load of dangerous materials, the peti-

tioners denied any knowledge of the nature of their cargo. The court of appeals was not clearly wrong in concluding that the officers "had more than a 'bare suspicion' that the blasting caps were stolen" (Pet. App. 19a).

b. In any event, the search conducted here was reasonable as a necessary emergency measure to insure the safety of the general public. The truck contained boxes marked "Dangerous electrical blasting caps," it was being driven at night without tail lights, and its driver had told the officer that he was ignorant of its contents. The officers were justified in searching the vehicle in order to assure themselves that the unsafe, inadvertent, or improperly designated carriage of this highly explosive material on the public highway, see Ky. R. S. 189.160 (Pet. App. 18a), did not constitute a serious and immediate danger to the officers or the general public. In these circumstances, the search of the pickup truck was reasonable. Cf. *Cady* v. *Dombrowski*, 413 U.S. 433, 448; *Camara* v. *Municipal Court*, 387 U.S. 523, 539; *See* v. *City of Seattle*, 387 U.S. 541. In fact, when the officers verified what their view through the camper's rear window had revealed—that highly explosive material was being transported on the public highway in an improper manner—they immediately arranged to remove it from the public highway to a secluded spot.[3]

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[3]In addition, we submit, by their actions prior to the search, petitioners relinquished any rights they might otherwise have had to complain about the instant search. When Officer Thompson asked permission to open the back of the truck, petitioners represented that they had no responsibility for or interest in it. Petitioner Lewis stated that he could not give permission to search the back of the truck because he had neither control over it nor knew its contents or how to open it (Tr. 266, 291). Petitioner Combs, who stood mute at the time of the search, also testified that he did not know the contents of the back of the truck (Tr. 267). Having led the officers to believe at the time of the search that petitioners had no

5. Finally, petitioners contend (Pet. 12-17) that their Sixth Amendment rights were violated because the venue of their second trial was laid in the wrong judicial division of the Eastern District of Kentucky. Petitioners misconceive the facts. In the first place, there are no judicial divisions in the Eastern District of Kentucky, see 28 U.S.C. 97.[4] Even if there had been a transfer between divisions, in 1966 Congress specifically eliminated the requirement in Rule 18, Fed. R. Crim. P., that a criminal trial must be held in the judicial division where the offense arose. Advisory Committee Note to 1966 Amendments to Rule 18, 18 U.S.C. App., pp. 4497-4498. In addition, the record does not show that petitioners renewed their claim prior to their second trial, which was held in Pikeville, Kentucky, where petitioners had previously indicated that their attorney practiced. In short, since it is not disputed that petitioners were tried within the judicial district where the offense arose, their Sixth Amendment rights were not violated. *United States* v. *Fernandez*, 480 F.2d 726, 730 (C.A. 2); *United States* v. *Florence*, 456 F.2d 46, 49-50 (C.A. 4). See also, *United States* v. *Anderson*, 328 U.S. 699, 704-705.

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privacy or any other interest in the back of the pickup truck, that they could take no responsibility for allowing a search, and that the officers could do as they wished, petitioners cannot now complain that the search of the back of the truck adversely infringed upon their reasonable expectations of privacy.

[4]The absence of judicial divisions makes the claim under 18 U.S.C. 3240 (dealing with prosecution in newly created divisions) meritless, as the court below concluded (Pet. App. 10a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.